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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL L. McALEE, III, Appellant.	2 CA-CR 2006-0422 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200500468

Honorable David M. Roer, Judge
Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART
VACATED IN PART AND REMANDED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Daniel McAlee was convicted of two counts of kidnapping, two counts of aggravated assault, and one count of attempted second-degree murder. The charges stem from two separate incidents during which McAlee attacked the eight-year-old daughter of his girlfriend's sister. McAlee argues that the trial court erred in allowing testimony regarding allegations that he had molested the victim's cousins, in allowing the mothers of the child witnesses to sit near the children while they testified, and in admitting the victim's video-recorded forensic interviews. He also claims that insufficient evidence exists to support one of the kidnapping convictions. This court sua sponte raised the issues of whether the trial court had fundamentally erred by giving the jury erroneous instructions on attempted second-degree murder and by imposing consecutive sentences for the attempted second-degree murder count and one of the kidnapping counts.

¶2 The state concedes error on the jury instruction issue. Accordingly, because we agree with that concession, we vacate McAlee's attempted second-degree murder conviction and sentence and remand that charge to the trial court. We affirm the remainder of McAlee's convictions and sentences.

Evidence of Other Acts

¶3 McAlee first argues the trial court erred in permitting testimony regarding allegations that he had molested the victim's cousins because the alleged molestations were prior acts inadmissible under Rule 404(b), Ariz. R. Evid. But, although McAlee objected during the victim's testimony based on relevance, the record before us does not reflect that

he objected on Rule 404(b) grounds.[1] McAlee's general objection based on relevance was insufficient to preserve the Rule 404(b) issue. *See State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). Accordingly, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id., quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶4 McAlee has not demonstrated fundamental, prejudicial error. Several witnesses, including the victim, testified about each attack and identified McAlee as the perpetrator or otherwise connected him to the crimes. Although evidence of the allegations of molestation was offered as an explanation of McAlee's motive for attacking the victim, this evidence was clearly not the foundation of the case.[2] *See id.* ¶ 19. The foundation of the

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[1]The court and the parties appear to refer to some prior ruling of the court on this issue. But neither that ruling nor any arguments of counsel leading up to that ruling are in the record. And the record does not contain any written response by McAlee to the state's motion in limine to admit the evidence under Rule 404(b). McAlee is responsible for ensuring that the record "contains the material to which [he takes] exception." *See State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). We presume the missing portions of the record support the trial court's ruling. *See State v. Miles*, 211 Ariz. 475, n.1, 123 P.3d 669, 671 n.1 (App. 2005).

[2]The evidence the state offered in this case was not true other-act evidence governed by Rule 404(b). *Cf. State v. Connor*, 215 Ariz. 553, ¶¶ 29, 33, 161 P.3d 596, 605, 606 (App. 2007) (evidence defendant suspected of burglarizing victim's apartment offered to rebut

case was the overwhelming evidence identifying McAlee as the perpetrator. Any error in the admission of evidence of the allegations of the molestation did not go to the foundation of the case, take from McAlee an essential right, or deprive McAlee of any chance of a fair trial. *See id.*

¶5 Additionally, McAlee has not established he was prejudiced by the admission of this evidence. Although McAlee questioned the credibility of various witnesses during closing, several different witnesses—including the victim herself—positively identified McAlee in court as the perpetrator or otherwise connected him to both attacks. And, although McAlee asserted an alibi by telling police he could not have committed one offense because he was receiving medical care at an urgent care facility at the time of the attack, the urgent care facility's records did not show that he had been treated there. Finally, the jury was instructed that it was not to consider the other act evidence as evidence of McAlee's character, but only in determining "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Therefore, McAlee has failed to establish fundamental, prejudicial error in the admission of evidence of the allegations of molestation.

Children's Testimony

¶6 McAlee next argues the trial court violated his due process rights by permitting the mothers of five children to sit behind them while they testified. McAlee also minimally

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defendant's testimony he and victim were friends "not true other-act evidence as contemplated by Rule 404(b)").

argues that the court violated his due process rights by allowing one child to hold a doll and use it for demonstrative purposes while testifying. Because McAlee did not object to these procedures below, we review solely for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. To establish fundamental error, McAlee must first show error. *Id.* ¶ 23.

¶7 The trial court has discretion in exercising reasonable control over witness interrogation and may sua sponte enter orders designed to facilitate the truth-seeking process and to "protect witnesses from harassment or undue embarrassment." *See* Ariz. R. Evid. 611(a); *see also Pool v. Superior Court*, 139 Ariz. 98, 103-04, 677 P.2d 261, 266-67 (1984). The court reasonably could have concluded that permitting one child to use a doll for demonstrative purposes and allowing each child's mother to sit nearby would make the children more comfortable testifying and the interrogation more effective and that any potential prejudice to McAlee was minimal. And, the court instructed the jury that it was to decide the facts based solely on the evidence and was "not [to] be influenced by sympathy or prejudice."

¶8 Additionally, as the state notes, courts in a number of other jurisdictions have found no reversible error in allowing a parent to sit passively near a child witness during the child's testimony. *See, e.g., Holmes v. United States*, 171 F.2d 1022, 1023 (D.C. Cir. 1949); *Benton v. State*, 362 S.E.2d 421, 423 (Ga. Ct. App. 1987); *State v. Rowray*, 860 P.2d 40, 44 (Kan. Ct. App. 1993); *see generally* Carol A. Crocca, Annotation, *Propriety & Prejudicial*

Effect of Third Party Accompanying or Rendering Support to Witness During Testimony, 82 A.L.R.4th 1038 (1990); *cf. State v. Suka*, 777 P.2d 240, 242 n.1 (Haw. 1989) (although finding error in permitting victim/witness representative to stand behind and touch child witness, noting that "accompaniment by a *parent* or *other close relative* would be less prejudicial than would accompaniment by a victim/witness counselor as the former is more likely to be seen as family support rather than as vouching for the witness' credibility"). Under the circumstances, the court did not abuse its discretion. Accordingly, McAlee has not demonstrated there was any error, much less error that could be characterized as fundamental and prejudicial.

Admission of Recorded Interviews

¶9 McAlee next argues the trial court erred in overruling his objection to the admission of video-recorded interviews of the victim, during which she recounts details of the two attacks. We review a trial court's decision on the admissibility of evidence for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004). A prior statement that is inconsistent with a witness's in-court testimony is not hearsay and is admissible. Ariz. R. Evid. 801(d)(1)(A); *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994). If a witness feigns memory loss, the trial court may consider his or her in-court testimony as inconsistent with a prior statement regarding the subject matter the witness purports to forget. *See King*, 180 Ariz. at 275, 883 P.2d at 1031; *State v. Salazar*, 146 Ariz.

547, 550, 707 P.2d 951, 954 (App. 1985). Real memory loss does not render the statement inconsistent. *See State v. Just*, 138 Ariz. 534, 544, 675 P.2d 1353, 1363 (App. 1983).

¶10 Here, the state moved to admit the video-recorded interviews as prior inconsistent statements under Rule 801(d)(1)(A). The nine-year-old-child victim apparently broke down crying at least once on the stand and was having difficulty answering questions. She indicated in response to numerous questions that she did not remember what had happened but that she had truthfully told the interviewers "everything." Over McAlee's objection, the court admitted the recordings. Based on the victim's behavior on the stand, as well as her young age and the severity of the attacks she had experienced, the trial court reasonably could have concluded that the victim's inability to remember was feigned and that she did not want to testify fully because she was upset or intimidated. *See King*, 180 Ariz. at 275, 883 P.2d at 1031. We therefore cannot say the court abused its discretion in admitting the recordings.

¶11 Moreover, even if the trial court believed the victim's memory loss was real, sufficient foundation was established to play the video recordings to the jury as recorded recollections pursuant to Rule 803(5), Ariz. R. Evid. *See State v. Alatorre*, 191 Ariz. 208, ¶ 10, 953 P.2d 1261, 1265 (App. 1998). The victim testified that she had told the investigators everything shortly after the assaults and that everything she told them was true. Nevertheless, Rule 803(5) prohibits admitting a recorded recollection as an exhibit. *See*

DeForest v. DeForest, 143 Ariz. 627, 633, 694 P.2d 1241, 1247 (App. 1985). In this case, both recordings were admitted as exhibits.

¶12 McAlee relies on *State v. Martin*, 135 Ariz. 552, 663 P.2d 236 (1983), in support of his argument. But in *Martin*, our supreme court discussed the admissibility of prior consistent statements to rebut a claim of recent fabrication and held that the prior consistent statement must be made before any bias arose. *Id.* at 554, 663 P.2d at 238. That case has no application to the facts here.

¶13 In any event, even if the court erred in admitting the recordings under either Rule 801(d)(1)(A) or Rule 803(5), "[w]e will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000), *quoting State v. Atwood*, 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992). McAlee does not argue the verdict would have been different without admission of the recordings.[3] Rather, he appears to concede that the statements in at least one of the video recordings was largely cumulative to other testimony presented at trial. *See State v. Williams*,

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[3]McAlee contends only that the admission of the tape violated his right to confront and cross-examine witnesses, citing *Crawford v. Washington*, 541 U.S. 36 (2004). But McAlee did not object on Confrontation Clause grounds below and has therefore forfeited this argument absent fundamental error. *See State v. Bolton*, 182 Ariz. 290, 304, 896 P.2d 830, 844 (1995). And the victim, whose video-recorded interview is at issue, testified at trial and McAlee cross-examined her. Thus, no Confrontation Clause violation occurred, *see State v. Lopez*, 217 Ariz. 433, ¶ 17, 175 P.3d 682, 687 (App. 2008), and McAlee has not shown fundamental error.

133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of cumulative evidence harmless error). And as we have discussed, overwhelming identification evidence was presented establishing McAlee as the perpetrator in both attacks. After reviewing the video recordings, we see no reasonable probability that the jury's verdicts would have been different if the recordings had not been admitted into evidence. If the court did err in finding them admissible, such error was harmless beyond a reasonable doubt.

Erroneous Jury Instruction

¶14 This court sua sponte ordered supplemental briefing on whether the jury instruction on attempted second-degree murder constituted fundamental, prejudicial error. "The offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." *State v. Ontiveros*, 206 Ariz. 539, ¶ 14, 81 P.3d 330, 333 (App. 2003). Attempted second-degree murder may not be based on reckless conduct, nor may it be based on "knowing merely that one's conduct will cause serious physical injury." *Id.* Giving an instruction that allows the jury to convict for attempted second-degree murder based only on intention or knowledge that conduct will cause serious physical injury—or based on conduct that is merely reckless—allows the jury to render a guilty verdict based on a non-existent theory of liability and constitutes fundamental, reversible error. *See id.* ¶¶ 14, 17, 19.

¶15 Here, the jury was instructed as follows:

> The crime of attempting to commit second degree murder requires proof of one of the following:

> 1. The defendant intentionally engaged in conduct which would have been a crime if the circumstances relating to the crime were as the defendant believed them to be; or
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> 2. The defendant intentionally committed any act which was a step in a course of conduct which the defendant believed would end in the commission of a crime . . . .
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> . . . .
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> The crime of second degree murder requires proof of any one of the following:
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> 4. The defendant intentionally caused the death of another person; or
>
> 5. The defendant caused the death of another person by conduct which he knew would cause death *or serious physical injury*; or
>
> 6. Under circumstances manifesting extreme indifference in human life, the *defendant recklessly engaged in conduct which created a grave risk of death* and thereby caused the death of another person.

(Emphasis added.) Thus, the jury may have found McAlee guilty of attempted second-degree murder based on knowledge or intention that his conduct would cause only serious physical injury, not death, or based only on reckless conduct that created a grave risk of death. The instruction is incorrect and the error resulted in fundamental, reversible error.[4] *See Ontiveros*, 206 Ariz. 539, ¶ 19, 81 P.3d at 334. Therefore, we vacate the conviction and

[4]The state has conceded error in its supplemental brief. In McAlee's supplemental brief, he presents argument that exceeds the scope of our order requesting additional briefing. Accordingly, we disregard "Argument II" of McAlee's third supplemental brief.

sentence for attempted second-degree murder and remand for a new trial on this count. *Id.* ¶ 20.

Sufficiency of the Evidence

¶16 McAlee also asserts that insufficient evidence existed to support his conviction for kidnapping with respect to his second attack on the victim. But McAlee's argument conflates a claim of insufficient evidence with a claim of error in imposing consecutive sentences. And in his opening brief, McAlee cites substantial evidence that supports the kidnapping conviction. *See* A.R.S. § 13-1304(A)(3), (4); *see also State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) (reversal for insufficient evidence "only if no substantial evidence supports the conviction"). We therefore reject his claim of any purported error with respect to sufficiency of the evidence.

Sentencing

¶17 With respect to sentencing, this court sua sponte ordered supplemental briefing, directing the parties to address whether it was impermissible to impose consecutive sentences for one of the kidnapping convictions and the attempted second-degree murder conviction in light of A.R.S. § 13-116 and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). But because we are vacating the conviction for attempted second-degree murder, we do not resolve whether fundamental error occurred in imposing consecutive sentences for these two counts.

Conclusion

¶18 Based on the foregoing, we vacate the conviction and sentence for attempted second-degree murder and remand that count for retrial. We otherwise affirm McAlee's convictions and sentences imposed.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge